5-25-1976

Robert C. Osborne v. Pinkerton's, Inc.

Appellee's Brief 1976-SC-0192

APPELLEE'S BRIEF

559 SW 2d 486

SUPREME COURT OF KENTUCKY

File No. 76-192

ROBERT C. OSBORNE - - - - - Appellant

versus

PINKERTON'S, INC. - - - - - - Appellee

APPEAL FROM JEFFERSON CIRCUIT COURT
COMMON PLEAS BRANCH, FIRST DIVISION
HONORABLE MICHAEL O. McDONALD, JUDGE

BRIEF FOR APPELLEE

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It is certified that a copy hereof was mailed to Honorable Michael O. McDonald, Judge, Common Pleas Branch, First Division, Jefferson Circuit Court, Louisville, Kentucky, 40202; and to Mr. Louis M. Nicoulin, Suite 200, 310 W. Liberty Street, Louisville, Kentucky, 40202, Attorney for Appellant, Mr. Robert C. Osborne; Mr. William D. Lambert, 1200 One Riverfront Plaza, Louisville, Kentucky, 40270, Attorney for International Harvester; and Mr. Winfrey P. Blackburn, Jr., 3400 First National Tower, Louisville, Kentucky, Attorney for Aetna Insurance Company, this 24 day of May, 1976.

Frank P. Doheny Jr.
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TABLE OF CONTENTS AND AUTHORITIES

STATEMENT OF THE QUESTION PRESENTED

Whether the Trial Court was correct in dismissing the complaint of the Plaintiff for failure to prosecute his lawsuit, where the complaint was filed on May 16, 1973, and no further action was taken by the Plaintiff in this lawsuit for some two and one half years?

Appellee answers "Yes".

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COUNTERSTATEMENT OF THE CASE

A. Nature of the Proceedings

Plaintiff, Robert C. Osborne, filed suit on May 16, 1973, against International Harvester Company, Pinkerton's, Inc., and Aetna Insurance Companies. In essence the Complaint alleged that Pinkerton's, Inc. ("Pinkerton's"), was employed by International Harvester Co. ("Harvester") to investigate Osborne and that Pinkerton's furnished Harvester erroneous information that resulted in Plaintiff's discharge (T.R. 2, 3). The Complaint also sets out that at some point the discharge was rescinded (T.R. 3). The Complaint against Aetna Insurance Companies ("Aetna") is

apparently for medical benefits and/or proceeds of life insurance for employees of Harvester which are paid through Aetna (T.R. 4). That claim is for only One Hundred Twenty-One Dollars ($121.00) against Aetna (T.R. 5).

Pinkerton's answered on June 5, 1973 (T.R. 7). On June 7 an Agreed Order between Plaintiff and Aetna was entered granting Aetna up to and including June 22, 1973 to file an Answer (T.R. 8). However, the official record prepared by the clerk of the Jefferson Circuit Court on January 27, 1976 does not contain an Answer by Aetna.

On December 14, 1973, Harvester answered. No further action of any sort took place in this case until November 17, 1975 when Pinkerton's moved to dismiss the action as to it for failure to prosecute. The motion was heard one week later and on November 25, 1975, judgment was entered dismissing the action as to Pinkerton's (T.R. 13). The other Defendants did not move for dismissal and the action remains on the docket as to them.

B. Facts

The brief on behalf of the Plaintiff-Appellant contains some statements which may or may not be accurate. In any event, they do not appear in the Transcript of Record, as it is composed solely of the Plaintiff's Complaint, Answers on behalf of Pinkerton's and Harvester, an Order extending time for Aetna to answer, a Notice-Motion-Order of Pinkerton's to dismiss and then Plaintiff's Notice of Appeal and Desig-

nation of Contents of Record. Nothing else appears in the Transcript of the trial court by way of facts, and this Court must rely on the Transcript of Record for the issues and developments in this case.

ARGUMENT

The Trial Court Correctly Dismissed the Complaint of the Plaintiff for Failure to Prosecute Where the Plaintiff Took No Action in This Case for Some Two and One Half Years After the Complaint Was Filed.

Rule 41.02 of the Kentucky Rules of Civil Procedure provides as follows:

> (1) For failure of the Plaintiff to prosecute or to comply with these Rules or any order of the Court, a Defendant may move for dismissal of an action or of any claim against him.

It is clear, therefore, from the foregoing rule that the trial courts are and should be empowered to dismiss an action for failure to prosecute. The civil rule does not prescribe any guidelines as to what constitutes a failure to prosecute. If that were the sole authority on which Appellee relies, the action of the trial court might reasonably be questioned. However, the Jefferson Circuit Court has adopted rules which are enlightening on this point and the Supreme Court of Kentucky has passed on the issue of what constitutes a failure to prosecute on several occasions previously.

Rule 309 of the Rules of Practice of the Jefferson Circuit Court goes further than the civil rule. The Jefferson Circuit Court Rule provides as follows:

Rule 309—Dormant Actions.

All actions which have been filed for more than one year and are unassigned and in [which] no step has been taken for a period of one year, may be placed on the docket by motion of counsel, or court, and be summarily dismissed by the court unless some extraordinary or compelling reasons are shown.

In the case now before this Court no action of any sort was taken by anyone between December 14, 1973, when Harvester answered, and November 24, 1975, when Pinkerton's moved to dismiss. The case had remained completely dormant for a period of almost two years. With the exception of assenting to an Agreed Order on June 7, 1973, giving Aetna an extension of time in which to answer, the Plaintiff took no action in this case since his Complaint was filed on May 16, 1973. A period of some two and one-half years had expired from the time the Plaintiff last took any action until Pinkerton's moved to dismiss the claim.

The Plaintiff has cited *Schwartz* v. *Chesapeake & O. Ry. Co.*, 181 Ky. 1, 203 S. W. 852 (1918). In that case the action was not on the trial docket and a judgment of the trial court dismissing the action for failure to prosecute was reversed by this Court with the observation: "But we know of no authority authorizing the trial court to dismiss an action for want of prosecution without putting it upon the trial docket." While that may have been true in 1918 when *Schwartz* v. *Chesapeake & O. Ry. Co.* was decided, Rule 41.02(1) is based on Rule 41(b) of the Federal Rules of Civil Procedure and has not been amended by this Court in

any way since at least July 1, 1969. The trial court did have the power to dismiss this action for failure to prosecute whether or not it was on the trial docket. The action of the trial judge in dismissing the action after two and one-half years of inactivity by Plaintiff was certainly reasonable, especially when measured against the standard of one year prescribed in Rule 309 of the Jefferson Circuit Court Rules.

In *Modern Heating & Supply Co.* v. *Ohio Bank Building & Equipment Co.,* Ky., 451 S. W. 2d 401 (1970) this Court affirmed the dismissal of an action for failure to prosecute where Plaintiff had sought and obtained several extensions of time and had taken substantially no action for a period of three and one-half years. In that case the attorney for the Plaintiff claimed that he had received serious injuries in an automobile accident and asked the Court to excuse Plaintiff's inactivity on that ground. This Court observed: "The misfortune of Plaintiff's attorney, with whom we have great sympathy, did not excuse appellant from the duty to prosecute." The Court then quoted with approval from *Gorin* v. *Gorin,* 292 Ky. 562, 167 S. W. 2d 52 (1942) where the following language is found:

> A litigant may not employ an attorney and then wash his hands of all responsibility. The law demands the exercise of due diligence by the client as well as by his attorney in the prosecution or defense of litigation.

In this case as in *Gorin, supra* and *Modern Heating & Supply Co., supra,* there was some duty on the

Plaintiff-Appellant to see that his action was prosecuted. Where no depositions were taken or additional pleadings were filed, it cannot be said that that duty was discharged.

In *Nall* v. *Woolfolk,* Ky., 451 S. W. 2d 389 (1970), the trial judge, on his own motion, dismissed an action which had remained dormant some two and one-half years after it was filed. This Court observed that: "The power of dismissal for want of prosecution is an inherent power in the courts and necessary to preserve the judicial process." In *Nall,* the two and one-half year period of inactivity was identical to the period in the case now before this Court and the dismissal of the action for failure to prosecute was sustained.

In short, all that we know from the record in this case is that Plaintiff filed suit and then went substantially two and one-half years taking no action in that lawsuit. No excuse has been offered in this record for that inactivity. The judgment of the trial court on the record before it was correct and should be affirmed.

CONCLUSION

The record in this case shows simply that the Plaintiff filed a suit against three Defendants on May 16, 1973. The record shows that two Defendants, Pinkerton's and Harvester, have answered, and that one, Aetna, has not. The record shows that some two and one-half years after Pinkerton's was sued and without any action being taken against it, the trial court sustained Pinkerton's motion to dismiss against it for failure to prosecute. The action remains on the

docket with respect to both Harvester and Aetna and the Plaintiff is free to proceed against them if he desires. The trial court was correct by virtue of the decisions of this Court, the Kentucky Rules of Civil Procedure, and the Jefferson Circuit Court Rules, in dismissing this action against Pinkerton's where no action was taken against it for some two and one-half years, and the judgment of the trial court should therefore be affirmed.

Respectfully submitted,

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